No. 94-835

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CROWN CORK & SEAL CO., INC.,
Petitioner,

v.

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. THE RESPONDENTS' ALMOST TOTAL RELIANCE ON THEIR INFLEXIBLE "RULE" FAVORING STATE LAW BORROWING IS MISPLACED

A. This Court's Decisions Are Not In Accord With The Rule Upon Which Respondents Rely

Respondents United Steelworkers of America, AFL-CIO-CLC (the "Union") and Charles Thomas, *et al.* (collectively "Thomas") rely almost exclusively on a supposedly inflexible rule "requiring" state law borrowing. Union Br. at 7; *see also* Thomas Br. at 8. This reliance is misplaced, however, because "[a]lthough it has been suggested that federal courts always should apply the state statute of limitations most analogous to each individual case whenever a federal statute is silent on the proper limitations period . . . , a clear majority of the Court rejected such a single path." *Agency Holding*

Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143, 146 (1987). In fact, this Court's preference for state-law borrowing is merely a "fallback rule of thumb." *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 158 & n.12 (1983). Accordingly, this Court has not hesitated to borrow limitations periods from federal statutes that provide better analogies than those available in state law. *See, e.g., Agency Holding Corp.*, 483 U.S. at 152; *DelCostello*, 462 U.S. at 169.

None of this Court's recent decisions have articulated, let alone followed, the inflexible rule urged by respondents. This Court has not "required" that express federal statutory claims be governed by state limitations periods. Union Br. at 7, nor has this Court limited federal law borrowing to circumstances where state limitations periods would "frustrate the policies of the federal enactment." Union Br. at 5. Rather, this Court has applied a flexible balancing approach which takes into account many factors, including whether state or federal law provides a closer analogy to the cause of action in question and whether federal policies and litigation practicalities support borrowing a uniform limitations period. *See, e.g., Agency Holding Corp.*, 483 U.S. at 150, 153-54; *DelCostello*, 462 U.S. at 172.

In fact, this Court has noted that the process of determining which statute to borrow, whether state or federal, "is a delicate one." *Lampf, Pleva, Lipkind, Prupis & Pettigrow v. Gilbertson*, 501 U.S. 350, 356 (1991) (hereinafter *Lampf*). This delicate process of identification, analysis and balancing is simply inconsistent with the hard-and-fast "rule" mandating state law borrowing which respondents claim exists.

Moreover, since 1983 when this Court decided *DelCostello*, three of its six "borrowing" decisions ultimately held that a limitations period from elsewhere in *federal* law was applicable. *Lampf*, 501 U.S. at 355; *Agency Holding Corp.*, 483 U.S. at 156; *DelCostello*, 462 U.S. at 169.

This kind of decisional track record hardly comports with the respondents' claim to an invariable state-law borrowing rule.

Moreover, the Union's attempt to distinguish these three decisions borrowing a federal limitations period merely demonstrates the weakness of their position. For example, the Union argues that *DelCostello* is inapplicable to the analysis here because it involved an implied, rather than express, cause of action. Union Br. at 10. This Court, however, clearly stated that it "need not address" this issue because it would have reached the same result even if the cause of action had been express: "even if this action were considered as arising solely under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, the objections to use of state law and the availability of a well-suited limitations period in § 10(b) would call for application of the latter rule." *DelCostello*, 462 U.S. at 159 n.12.

The Union's attempt to distinguish *Agency Holding Corp.*, in which this Court held that civil RICO claims were subject to the four-year limitations period of the Clayton Act, 483 U.S. at 156, is equally unpersuasive. The Union attempts to segregate *Agency Holding Corp.* from the instant analysis by arguing that this Court's selection of a federal statutory limitations period over a state common law analogue was hardly surprising because RICO's underlying "concepts" were "simply unknown at common law." Union Br. at 12. However, the same holds true for the WARN Act—plant closing notice requirements have no common law roots.

The Union further attempts to distinguish *Agency Holding Corp.* on the ground that RICO was based upon a federal statutory "antitrust model" and thus, the "clearest current" in the legislative history of RICO " 'is the reliance on the Clayton Act model.' " Union Br. at 12 But, the "clearest current" in the legislative history of the WARN Act is also its "reliance" on a federal statutory "model"—the National Labor Relations Act. Crown Br. at 15-18.

Finally, although the Union attempts to contrast the WARN Act's alleged simplicity to RICO's complexity, the Union itself claims that a significant number of "complex issues" will need to be decided in order to ascertain "whether a violation has occurred." Union Br. at 29 n. 23. And, the government concedes not only that WARN Act analogies would have to be identified on a state-by-state basis, but that an analogy adopted in one state could be rejected in another either because the law of the second state furnished "an even more precise analogue" or in order to avoid a limitations period perceived to be too "short." U.S. Br. at 27 n. 19. The fact that the "geographic character" of WARN Act claims frequently will be multistate, *see* Crown Br. at 31-32, should be "accorded particular weight" and " 'indicates the desirability of a uniform federal statute of limitations.' " *Lampf*, 501 U.S. at 357. Therefore, under the WARN Act, just as under RICO, state law borrowing would "present the danger of forum shopping and, at the very least, would 'virtually guarante[e] . . . complex and expensive litigation over what should be a straightforward matter.' " *Agency Holding Corp.*, 483 U.S. at 154.[1]

Indeed, if there were a rule "requiring" state law borrowing, this Court would have had no need in *Reed v. United Transportation Union*, 488 U.S. 319 (1989), to observe that federal law "d[id] not supply a more analogous statute" than state law. *Id.* at 334. Nor if state law borrowing were mandatory would there have been a

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[1] Likewise, though *Lampf* did involve an implied cause of action, this Court rejected a hard-and-fast rule in favor of its "delicate" analysis of factors favoring both state and federal limitations periods. *Lampf*, 501 U.S. at 356 (plurality opinion); *see also id.* at 368 (Stevens, J., dissenting) (noting that the *Lampf* Court "reject[ed] the traditional rule of applying a state limitations period when the federal statute is silent") and *id.* at 369 (O'Connor, J., dissenting) (agreeing "that predictability and judicial economy counsel the adoption of a uniform federal statute of limitations for actions brought under 10(b) and Rule 10b-5").

need for the *Reed* Court to discount *all* "exceptions" to state law borrowing prior to deciding to borrow from state law. *Id.* at 334.

B. This Court Should No Longer Give Great Weight To The Presumption That Congress Intended Courts To Apply State Limitations Periods

1. *In Light Of This Court's Recent Limitations Borrowing Decisions, This Court Ought Not To Assume That Congress Presumed That State Limitations Periods Would Govern WARN Act Claims*

The vitality of the respondents' rule mandating state law borrowing rises or falls with the weight, if any, which should be given to the presumption that Congress in recent years has continued to assume that state limitations periods will govern federal enactments. The primary, if not sole, underpinning for the "rule" favoring state law borrowing had been congressional awareness of this Court's past "practice" of borowing state law. That past practice had allowed this Court previously to assume that Congress intended by its silence that courts borrow state law. *See, e.g., International Union, UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 704 (1966).

However, by 1988, when Congress enacted the WARN Act, the landscape had changed considerably. In 1983, this Court ruled that borrowing federal limitations periods was appropriate when a federal law "clearly provides a closer analogy than available state statutes" and "when the federal policies at stake and the practicalities of litigation" favor borrowing a federal limitations period. *DelCostello*, 462 U.S. at 172. And, only one year before passage of the WARN Act, this Court had held in *Agency Holding Corp.* that an express federal cause of action could be subject to a limitations period from a different federal statute with "similarities in purpose and structure." *Agency Holding Corp.*, 483 U.S. at 152. In reaching this decision, this Court made clear

that it had rejected a "single path" of state law borrowing, *id.* at 146, and it applied instead a balancing analysis, in which the availability of close federal analogies, the risk of forum shopping, the need for uniformity and certainty, and the danger of costly collateral litigation were weighed. *Id.* at 149-154. Accordingly, it was noted that *Agency Holding* established a "new rule" that "congressional silence" be interpreted to require, not the borrowing of state statutes of limitations, but rather the application of the "appropriate limitations period *state or federal.*" *Agency Holding,* 483 U.S. at 166 (Scalia, J., concurring in judgment) (emphasis in original).

In light of these decisions and the flexible borrowing analysis utilized by this Court, Congress would have been foolish to assume in 1988, a year after *Agency Holding Corp.*, that WARN Act claims routinely would be subject to state limitations periods. In fact, if anything, "it could be expected that Congress would adapt" to this "general change of approach" for all "statutes passed after the decision came down." *Agency Holding,* 483 U.S. at 167 n.4 (Scalia, J., concurring in judgment).

2. *The Congress Has Affirmatively Moved Away From Reliance Upon State Law Borrowing*

Even Congress has recognized that state law borrowing has little inherent value. In 1990, Congress enacted 28 U.S.C. § 1658, a federal "fallback" limitations period, because the practice of borrowing analogous state limitations periods had imposed "uncertainty on litigants" and because "reliance on varying state laws results in undesirable variance among the federal courts and disrupts the development of federal doctrine on the suspension of limitation periods." H.R. Rep. 734, 101st Cong., 2d Sess. 24 (1990), *reprinted in* 1990 U.S.C.C.A.N 6860, 6870 (quoting *Report of the Federal Courts Study Committee* 93 (1990)).

And, perhaps even more significantly, the Congress recognized in 1990 that a presumption in favor of state

law borrowing no longer existed because "[a]t present, the federal courts 'borrow' the most analogous state *or federal* law limitations period for federal claims lacking limitations periods." *Id.* (emphasis added). Thus, no later than 1990 the Congress recognized that (1) the presumption favoring state law borrowing had been abandoned in favor of a rule which dictated borrowing the most analogous *state or federal* statute, (2) state law borrowing had created litigation problems, and (3) state limitations periods should not govern future legislation. Thus, at this stage, there seems little sense in adopting the position which respondents urge upon this Court—a strong adherence to an assumption about Congressional desire and intent which, even if it existed at some point in this generation, has long since, and not surprisingly, been abandoned.

II. VIEWED ON THE MERITS, IT IS CLEAR THAT THE NLRA IS THE FAR SUPERIOR BORROWING SOURCE FOR THE WARN ACT'S STATUTE OF LIMITATIONS

A. The NLRA Provides The Closest Analogy To The WARN Act In That They Share A Commonality Of Purpose And Similarity Of Elements

The Union does not dispute that the NLRA is this nation's premier labor statute "confer[ing] certain affirmative rights on employees and [placing] certain enumerated restrictions on the activities of employers." *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316 (1965). Nor does the Union dispute that one of these "affirmative rights" is the well-established and long-standing right to receive advance notice of an impending plant closing, relocation or other similar managerial action.[2] *See First*

[2] The Union concedes that long before the WARN Act became law, employers were already providing advance notice of plant closings and mass layoffs to comply with their obligations under the NLRA. Union Br. at 23. As the government explains, "[p]rior to the WARN Act's passage . . . unionized workers received an average of only 14 days' advance notice before a plant closing or

National Maintenance Corp. v. NLRB, 452 U.S. 666, 681-82 (1981). Finally, the Union does not dispute that the WARN Act codifies a right to receive such notice. Union Br. at 23.

Moreover, the Union and its amici do not challenge the litany of other similarities that Crown has catalogued between the WARN Act and the NLRA. Both the NLRA and the WARN Act afford protection not only to affected employees, but to the community at large as well, *see* Crown Br. at 14 n.4, and under both statutes, the amount of advance notice afforded may be reduced when an employer can demonstrate special or emergency circumstances. *See* Crown Br. at 14 & n.5. In addition, WARN and the NLRA provide analogous remedies—backpay for each day of violation. *See* Crown Br. at 15.[3]

Unable to make any meaningful distinctions between the WARN Act and the NLRA with regard to notice, the Union attempts to distinguish the two acts by labeling WARN Act rights as "substantive" and the analogous NLRA rights as "procedural." Such labels add nothing to the analysis here.

First, bargaining rights can be seen as substantive both because they provide employees with the right to force employers to negotiate and because such negotiations ultimately impact upon the terms and conditions of employment.

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mass layoff. . . . By mandating 60 days' notice for all workers, Congress clearly intended to supplement existing rights under the NLRA." U.S. Br. at 20.

[3] The Union correctly notes that back pay is but one aspect of a range of remedies which may be imposed on an employer for commission of an unfair labor practice. Union Br. at 26. This does not defeat the NLRA/WARN Act analogy, however. First, it makes sense that WARN Act remedies are a subset of those available under the NLRA, since the notice obligation, which the WARN Act shares with the NLRA, is but one facet of the numerous rights and responsibilties included within the NLRA. Second, so long as there is an overlap in remedies, an analogy is appropriate. *See Agency Holding Corp.*, 483 U.S. at 151.

Similarly, while rights, like those provided by the WARN Act, in some sense merely give a "procedural setting," i.e., notice in which to achieve some other result, they also affect the employment relationship. For example, a union will often have a continuing bargaining relationship with an employer, even after a WARN Act claim accrues.[4] In that instance, the WARN Act claim will provide unions more leverage with which to obtain benefits for their members. Thus, an employer's failure to provide sixty days advance notice will give the Union one more chip at either the effects bargaining table or as part of a continuing bargaining relationship between it and the multi-plant employer. Hence, the Union's assertion that the WARN Act has no impact on bargaining (Union Br. at 17 n.12) is incorrect.

Even in the non-union setting, the WARN Act affords an opportunity for increased leverage under the NLRA. In the face of impending employment loss non-union employees can engage in concerted activity and effectively exercise their NLRA Section 7 rights to extract "concessions" from their employer, much as unions do through formal collective bargaining.

Finally, even in the legal arena, there is no meaningful procedure/substance distinction. This Court's decision in *Metropolitan Life Insurance Co. v. Massachusetts,* 471 U.S. 724 (1985), upon which respondents rely, has nothing to do with the issue of limitations borrowing, and, contrary to respondents' arguments, does not delineate two separate categories of federal labor law.

In fact, in *Metropolitan Life,* this Court observed that the NLRA had both procedural and substantive goals. This Court recognized that the NLRA was intended not only to create an equitable process for determining the terms and conditions of employment, but also to resolve the substantive problem of "depress[ed] wage rates and

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[4] This will be true in the case of a mass layoff, or, as in this case, if the union represents employees at several of the employer's facilities.

the purchasing power of wage earners in industry." *Id.* at 754 (internal quotation omitted). This Court concluded that local or federal regulations which established minimum terms of employment were not inconsistent or incompatible with these goals. It certainly did not hold that the NLRA served only procedural ends. *Id.* at 754-55.

While the NLRA imposes certain obligations on employers planning to reduce their workforce, the Act does not dictate the results which flow from those obligations. In its simplest terms, the Act affords employees the *opportunity* to achieve for themselves severance pay, retraining or similar unemployment benefits.

Likewise, the WARN Act imposes certain notice obligations on the employer, but does not dictate the terms which may flow from the employee's use of that notice period. The notice affords employees the *opportunity* to seek retraining and a speedy reintegration into the workforce. Thus, even if the NLRA is characterized as procedural and the WARN Act as substantive, both statutes afford notice for the very same purpose, affording employees the *opportunity* to ameliorate the detrimental effects of economic dislocation.

In sum, the WARN Act is an outgrowth of the NLRA. The NLRA and the WARN Act share a common purpose and similar elements and they both aim to ameliorate the hardships of unemployment. As a result, the NLRA provides a clear, obvious and appropriate source for the WARN Act's limitation period.[5]

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[5] The NLRA is a far closer analogy to the WARN Act than the variety of unrelated state laws posited by the Union. *See* Crown Br. at 22-25. These laws offer nothing to support state law borrowing except that they contain limitations periods in excess of six months. Moreover, the FLSA is an equally inappropriate borrowing source as it does not share the WARN Act's principal purpose. The FLSA's legislative history shows that it was Congress' intent "to protect certain groups of the population from *substandard wages and excessive hours* which endangered the national health and well-being and free flow of goods in interstate commerce." *Brooklyn Sav. Bank v. O'Neill*, 324 U.S. 697, 706 (1945) (emphasis

B. Borrowing the NLRA's Limitations Period Would Further the WARN Act's Purposes

1. *A Short Limitations Period Will Force Employees To Focus On Their WARN Act Rights Quickly*

Congress enacted the WARN Act to provide, among other things, notice of imminent dislocation in order to afford employees and the government the opportunity to promptly provide assistance such as counselling and retraining to enable workers to re-enter the job market as quickly as possible. *See* 20 C.F.R. § 639.1(a). As the Union's amici California Rural Legal Assistance, Inc., *et al.* (collectively "Amici") point out, "the success of counseling and job training assistance is often related to how early notice is provided to workers." Amici Br. at 16. According to the General Assounting Office, dislocated worker studies show that more workers will seek assistance if such assistance is available close to the time of job loss rather than years later. Amici Br. at 16.

A short limitations period will tend to force employees to focus on their WARN Act rights close to the time of the statutory violation. This will increase the likelihood that legal counsel will be sought and that employees will band together to take prompt collective action before they disperse or obtain alternative employment. Moreover, by encouraging focused, collective action, a short limitations period will likely enhance, rather than detract from, the prospects of employees demanding immediate assistance from their employers in exchange for waiving their WARN Act claims. The alternative, a

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added). Thus, under the FLSA, an employer must provide minimum wages and not exceed maximum hours for its non-exempt employees. The WARN Act, on the other hand, mandates no standards and is simply a *notice* statute in a loss of employment context. It has nothing to do with the main thrust of the FLSA which is to eliminate labor conditions detrimental to the maintenance of a minimum standard of living in an ongoing employment relationship. As a result, the FLSA offers no real analogy to the WARN Act.

lengthy limitations period might well tend to encourage claimants to sit on their WARN Act rights until they determine whether they secure other employment, relocate, etc. Thus, a short limitations period will create a greater likelihood that the issue of prompt assistance will be grappled with contemporaneously with the plant closing—the real purpose behind the WARN Act.[6]

Indeed, Congress's intent to encourage simple, fast and collective action is apparent on the face of the statute. Congress kept the statute short and simple, stating the notice obligation, the narrow defenses and the limited remedy in approximately five pages of text. 29 U.S.C. §§ 2101-2109. Congress encouraged simple class resolution by providing that any person may sue "for other persons similarly situated," 29 U.S.C. § 2104(a)(5), and it added an incentive for attorneys to pursue WARN claims by allowing the award of attorney's fees to prevailing parties. 29 U.S.C. § 2104(a)(6). The Act also contains a broad venue provision which permits suits to be filed in any judicial district in which "the employer transacts business," thereby lowering barriers to suit. 29 U.S.C. § 2104(a)(5). In light of these provisions as well as the underlying purpose of the statute, a lengthy statute of limitations would be incongruous.

2. *A Six Month Statutory Period Provides Sufficient Time In Which To Bring WARN Act Claims*

The government argues that six months is an insufficient period within which to vindicate WARN Act rights. *See* U.S. Br. at 23. There are at least three reasons why

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[6] The Union argues that "the statute of limitations issue arises only where employees sue for back pay because they have *not* received that 'immediate cushion.'" Union Br. at 14 n.9. This misses the point. Even in the event that a full sixty days notice is not provided, prompt collective action by employees is beneficial. Requiring the employees and the employer to focus on WARN Act rights close to the time of job loss will enhance the chances that employees will receive the necessary assistance and retraining to reintegrate into the job market.

this concern is unfounded. First, actual WARN Act litigation proves that a six-month limitations period is workable. Numerous represented *and* unrepresented plaintiffs have instituted litigation within six months or less. *See* Crown Br. at 29 n.14.

Second, it is virtually impossible to believe that a WARN Act event could pass undetected. While the government expresses concern that potential plaintiffs would be disadvantaged by a six-month limitations period because "a violation of the WARN Act may often be difficult to ascertain," U.S. Br. at 23, the usual situation will be one in which the employment loss is such a cataclysmic occurrence that it simply will not go unnoticed. Moreover, to the extent that a WARN Act violation is truly "difficult to ascertain," the normal discovery rule attendant to statutes of limitations would undoubtedly provide protection to claimants, *i.e.* the statute only begins to run when the plaintiff knew or *should have known* of the violation. *See, e.g., Urie v. Thompson,* 337 U.S. 163, 170 (1947).

Third, the easy availability of class litigation with respect to WARN Act claims argues against the government's concern, since one person can seek redress for all others. Thus, WARN Act rights can be vindicated even if only one potential claimant files within the six month period. And, given the availability of legal counsel in this country, the specific provision of the WARN Act providing for the award of counsel fees, 29 U.S.C. § 2104(a)(6), the relative ease under the Act of grouping large numbers of similarly situated claimants together (thereby setting the stage for a substantial aggregate award), and the publicity plant closings create, it seems unlikely that WARN Act claimants will find it difficult to acquire legal assistance. Further, many WARN Act plaintiffs, such as the Union in this case, are organizations comfortable in the environment of the rapid resolution of labor disputes. It is highly unlikely that employ-

ment losses, whether in the form of a plant closing or scattered mass layoffs, will escape their attention.[7]

3. *Application Of The NLRA's Six-Month Statute Of Limitations To WARN Act Claims Results In A Proper Balance Between The Interests Of Employers And Employees*

Statutes of limitations balance the interests of plaintiffs and defendants and protect important social interests in certainty, accuracy and repose. A six-month limitations period will protect employers from the assertion of stale claims [8] and allow them to quantify their contingent liabilities within a reasonable period of time, while still ensuring that employees will have adequate time within which to bring suit.

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[7] While it is true that the NLRA only requires that the employee file an administrative charge and not a lawsuit within the six-month period, *see* U.S. Br. at 24, this does not make a six-month limitations period inappropriate. First of all, Congress apparently believed that WARN Act claims were simple enough to be resolved directly in the courts, providing workers with generous venue provisions, simplied class procedures and attorney's fees in lieu of an administrative process. *See* 29 U.S.C. § 2104(a)(5), (6); *Halkias v. General Dynamics Corp.*, 31 F.3d 224, 239 n.5 (5th Cir.), *rehearing en banc granted*, 31 F.3d 248 (5th Cir. 1994) ("Indeed the absence of a complex administrative structure may be emblematic of the simplicity of a WARN claim.").

Secondly, other federal statutory schemes provide for relatively brief periods of time in which claimants must find lawyers and institute suit. For example, while it is true that charges of discrimination under Title VII are initially filed with administrative agencies such as the Equal Employment Opportunity Commission ("EEOC"), *see* U.S. Br. at 23-24 n.15, it is also true that once the EEOC issues its "right to sue letter" the claimant has only 90 days in which to institute a federal court action. *See* 42 U.S.C. § 2000e-5(f)(1). If it is not unreasonable in an employment discrimination setting to put plaintiffs to the test of finding legal counsel and instituting suit within three months, why is it unreasonable to give WARN Act claimants six months to bring their claims?

[8] The government admits that "[c]oncern for the possibility of stale claims could serve to rebut the presumption of state-law borrowing." U.S. Br. at 25.

The need for a short limitations period is particularly strong because of the subject matter of the WARN Act. After a plant closing or mass layoff, employees typically disburse, and the records of defunct businesses become harder to find. A short limitations period will ensure that evidence is available and events are fresh in the minds of those with knowledge. *See Wilson v. Garcia,* 571 U.S. 261, 271 (1985) ("Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost."); *see also Johnson v. Graphic Communications Int'l Union,* 930 F.2d 1178, 1182 (7th Cir.) (holding that NLRA's six-month limitations period prevents litigation after records have been destroyed and witnesses have relocated), *cert. denied,* 502 U.S. 862 (1991).

The government glibly dismisses the need for a short limitations period with the suggestion that an employer who is concerned with defending a WARN Act lawsuit simply maintain records necessary for its defense. *See* U.S. Br. at 25 n.16. This argument misses the point.

First, employees who may be necessary witnesses tend to disburse after a plant shutdown. Second, an employer's defenses to a WARN Act claim may not be based solely on documentary evidence in its possession. Rather, an employer may launch a defense based on, for example, a precipitous and unexpected drop in consumer demand or the market price of goods which cannot be proved by documents in the employer's possession, custody or control. *See* 20 C.F.R. § 639.9(b). In any event, the closer a lawsuit is filed to the time of a plant closing or mass layoff, the more effective the presentation of the case for *both* plaintiff and defendant.

Beyond the problem of litigating stale claims, continuing employers, if faced with the lack of clarity brought about by a state law borrowing regime, will be handicapped in attempting to operate in the present and plan for the future. Unknown potential WARN Act liability

under a state law borrowing scheme, which could be substantial especially for struggling companies, would cast a cloud over the company's ability to deal with vendors, borrow money from banks, make decisions about capital investments, or even sell off the company itself. Hence, because state law borrowing would leave businesses unable to " 'calculate their contingent liabilities, not knowing with confidence when their delicts lie in response,' " *Agency Holding Corp.*, 483 U.S. at 150 (quoting *Wilson*, 471 U.S. at 275 n.3), such a limitations scheme would seriously restrict the ability of companies to go about their business.

III. BORROWING THE LIMITATIONS PERIOD OF THE NLRA WOULD MINIMIZE LITIGATION PROBLEMS

A. It Would Be Anomalous To Impose Different Limitations Periods For The Same "Failure To Give Notice"

The NLRA and the WARN Act share a commonality of purpose and similarity of structure. Both require an employer to provide advance notice to employees of imminent job loss. Nonetheless, state law borrowing exposes an employer to serial litigation over the same "wrongful act" and encourages wasteful and inefficient use of judicial resources. Employees can challenge a failure to give adequate notice under the NLRA within the six month limitations period and many years later relitigate the same claim under the WARN Act, honed and refined by their experience.

While overlapping causes of action are certainly not unique to the WARN Act and the NLRA, the ability to litigate these claims in divergent time frames encourages abuse of the system and adds complexity to litigation. For example, a union attempting to overcome an employer's successful defense of emergency circumstances

in the initial NLRA proceeding will certainly recast and refine its presentation in its second bite at the apple.[9]

B. Borrowing State Limitations Periods Would Encourage Forum Shopping, Create Uncertainty And Encourage Expensive Collateral Litigation

The Union does not challenge the fact that with state law borrowing the WARN Act's broad venue provision will "present the danger of forum shopping." *Agency Holding Corp.*, 483 U.S. at 154. The Union acknowledges the risk of forum shopping, but it posits that the problem can be minimized through the adoption of a uniform "generic characterization" of all WARN Act Claims. Union Br. at 19. There are multiple problems with this argument.

First, it is impossible to select a uniform state law analogue to the WARN Act, because it is a statutory creation without common law roots.[10] Indeed, the government recognizes that uniform, nationwide characterization may not be appropriate either because closer analogies might be available in some states or because the limitations period associated with the best analogy was too short. U.S. Brief at 27 n.19.

Second, contrary to the Union's misleading characterization of the WARN Act as "plain-vanilla," *see* Union Br. at 13, it is a statute presenting a range of "complex issues," Union Br. at 29 n.23, and where for example, there are at least two separate causes of action which can arise under the Act. The first, which is at issue in this litigation, is a private cause of action brought by em-

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[9] Issues of res judicata and collateral estoppel only add levels of complexity to this scenario. The WARN Act presents special problems in this regard because the courts have not yet had the opportunity to develop and refine the terms and contours of the statute.

[10] Thus, it is not surprising that there has been a wide divergence of opinion on how to characterize these claims in the federal courts and even within respondents' camp. The Union and its amici propose a potpourri of Pennsylvania statutes with varying limitations

ployees or their representative. The second is a potential cause of action asserted by the unit of local government. *See* 29 U.S.C. § 2104(a)(5). With state law borrowing, not only must the federal court decide upon the appropriate limitations period for the private cause of action, but it must decide whether there is a different limitations period for the governmental claim and what that limitations period should be.

Third, "generic characterization" will not eliminate forum-shopping. Even for a single, nationally available cause of action, there are widely divergent limitations periods throughout the fifty states.[11] A potentially tardy plaintiff could browse through the available jurisdictions until one is found which will accommodate his/her claim.[12]

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periods as well as the federal Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* The only commonality among these limitations periods is the fact that they are in excess of six months and they do not contain a notice obligation in the event of an employment loss, the WARN Act's central and motivating purpose.

[11] One need look no further than the limitations periods for contract claims to illustrate this problem. *See, e.g.*:

Alabama:	six years, Ala. Code § 6-2-34.
Florida:	five or four years, Fla. Stat. Ann. §§ 95.11(2)(b), (3).
Indiana:	ten, six or two years; Ind. Code §§ 34-1-2-2, 34-1-2-1, 34-1-2-1.5.
Iowa:	ten, five or two years, Iowa Code §§ 614.1(5), (4), (8).
Kansas:	five or three years, Kan. Stat. Ann. §§ 60-511, 60-512.
Kentucky:	fifteen or five years, Ky. Rev. Stat. Ann. § 413.090(2); 413.120(1).
Michigan:	six years, Mich. Comp. Laws § 600.5807(8).
Ohio:	fifteen or six years, Ohio Rev. Code Ann. §§ 2305.06, 2305.07.

[12] Moreover, the majority of circuit courts borrow the limitations period of the forum state regardless of the site of injury, thereby increasing the likelihood of forum-shopping. *See* Crown Br. at 30 n.15. Even in those circuit courts which do not adopt the forum

Fourth, if the government is correct, and different state law analogies must be identiffed on a state-by-state basis, costly collateral litigation and uncertainty would be inevitable. In every state, litigants will be forced to fight among various state law analogies, based both on whether they provide appropriately "precise" analogies to the WARN Act and on whether the limitations period of a precise analogy was too short. U.S. Brief at 27 n.19. In addition, litigants would have no way to determine what limitations period governed their claims, creating intolerable uncertainty for all.

Finally, while broad venue provisions with their invitation to forum-shopping and other litigation complexities do not begin and end with the WARN Act, there is no reason to encourage them through blind adherence to a "rule" of state law borrowing. This is particularly true where, as in the case of the WARN Act, there is no state law analogue. Although forum-shopping is not determinative in this Court's borrowing analysis, it is clearly a negative factor which militates against resort to adoption of state limitations periods. *Agency Holding Corp.*, 483 U.S. at 154. In the WARN Act setting, forum shopping will be encouraged by state-law borrowing not only as a matter of convenience or simply to gain a "home-state edge," but because the very vitality of the claim is likely to be at stake, i.e. an action is time-barred in one jurisdiction but not in another. It is when there are such differences in the law that forum shopping with all of its attendant "races to the courthouse" and "first-filed" battles is at its worst, and the unnecessary burden on the litigants and the courts is at its greatest.

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state's statute of limitations but look to the forum with the dominant contacts, preliminary and possibly dispositive choice of law issues will guarantee complex and time consuming litigation over collateral matters and undermine the WARN Act's uniform character and scope. *See Agency Holding Corp.*, 483 U.S. at 154; Crown Br. at 31.

CONCLUSION

For the foregoing reasons and those stated in Crown's opening brief, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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